IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 850 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE KSHITIJ R.VYAS
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

EVERGREEN CORPORATION
Versus
A'BAD MUNICIPAL CORPORATION

Appearance:
1. First Appeal No. 850 of 1982
MR HM BHAGAT for Petitioner No. 1-2-2
MR MG NAGARKAR for Respondent No. 1

CORAM : MR.JUSTICE KSHITIJ R.VYAS
and
MR.JUSTICE K.M.MEHTA

Date of decision: 07/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.M.MEHTA)

1. M/s. The Evergreen Corporation and Devendar Kikubhai Dave-appellants-original defendants have filed this appeal under Section 96 of the Code of Civil Procedure against judgement and decree dated 28.7.1981 passed by the learned judge, City Civil Court, Ahmedabad in Regular Civil Suit No. 2681 of 1977 filed by the Municipal Corporation of City of Ahmedabad-respondent-original plaintiff.

2. The facts giving rise to this appeal are as under:

2.1 The plaintiff is a Corporate body constituted under the provisions of the Bomabay Provincial Municipal Corporation Act, 1949 (hereinafter referred to as "the Act"). Defendant No. 1 is a partnership firm carrying on business at Bombay and defendant No. 2 is its partner.

2.2 The defendants had submitted their offer for supply of paving asphalt 80/100 grade in 143/150 kg. reconditioned steel drums approved by Burma shell by their letter dated 7.4.1973 for the year 1973-74. The quotation for the said supply was at Rs. 483.75 per M.T. plus tax. The delivery was to be made of 80 to 100 M.T. per day, after receipt of the order. After the receipt of the quotations the defendants were called on 28.4.1973 for negotiating the terms of their offer. After discussion they agreed that if there is any increase of tax or levy, the same would be charged extra, and if there is any decrease other than S.T. (Sales Tax) the defendants would give rebate for the same. They also confirmed that their prices are firm throughout the year and they would not charge more even if there was any price revision circulars issued by their principals. These additional terms were confirmed by their letter dated 28.4.1973.

2.3 The defendants' offer to supply the paving asphalt on the above terms and conditions was accepted by the Standing Committee by its resolution No. 604 dated 6.6.1973. In view of the same, the contract was executed between the parties on 20.11.1973 for the supply of 2000 M.T. of paving asphalt. As per the terms of the contract the defendants were required to give security deposit of Rs. 45,100/- and defendants have given bank guarantee, for the security deposit amount, of the Municipal Corporation Bank original defendant No. 3 in

the suit. The third defendant as part of its banking business, has executed an indemnity bond on 5.9.1973 in favour of Ahmedabad Municipal Corporation, undertaking to indemnify and keep indemnified the plaintiff to the extent of Rs. 45,100/- against the loss suffered or damage caused to the plaintiffs by reason of any breach by defendant Nos. 1 and 2 of any of the terms and conditions contained in an agreement executed by the said defendants for the supply of paving asphalts to the plaintiff during the year 1973-74.

2.4 As per the indemnity bond the third defendant has further undertaken that the bank shall continue to be liable till all the dues of the plaintiff are fully paid or till the plaintiff certify that all the terms and conditions of the agreement in question have been fully and properly carried out by the said supplier i.e. defendant Nos. 1 and 2.

2.5 As per the terms of the contract, the plaintiff placed an order for the supply of contracted quantity of paving asphalt 80/100 grade to be supplied 80 to 100 M.T. per day. The supply of the contracted quantity was to be completed by the end of March, 1974. The defendants started supplying goods from 9.10.1973. The defendants supplied about 349 M.T. from October 1973 to 21.2.1974.

2.6 It is the case of the plaintiff that after supplying 349 M.T. the defendants failed and neglected to supply the goods in question. In view of the same, the plaintiff addressed letters dated 13.12.1973 and 15.1.1974 to supply the remaining contracted quantity of asphalt by supplying 75 drums per day regularly. In spite of the aforesaid repeated reminders, the defendants supplied only 381 M.T. till the end of the contract period i.e. 31.1.1974.

2.7 In view of the aforesaid circumstances, it is alleged by the plaintiff that the defendants have committed breach of contract for the supply of 2000 M.T. during the year 1973-74.

2.8 It is the case of the plaintiff that the defendants failed and neglected to supply the goods, the plaintiffs were constrained to purchase 710-474 M.T. from open market at the risk and costs of the defendants. The plaintiff had to incur additional expenses of Rs. 2,83,279.51 on the purchases of the aforesaid quantity of asphalt.

2.9 Thereafter the plaintiff served a notice of

demand on 30.8.1976 on the defendants for the supply of goods. Since the defendants did not respond to the said notice, the plaintiff filed suit on 28.3.197 against defendant Nos. 1 and 2 praying for a decree of Rs. 2,83,279.51 with future interest at the rate of 12% per annum to be passed against the defendants. However, subsequently the plaintiff amended the plaint and defendant No. 3 bank was also joined as party and it was alleged that defendant No. 3 is also initially liable to pay Rs. 45,100/- with 6% interest and costs and if third defendant is not held liable to pay amount of Rs. 45,100/-, full decree against the first and second defendant be passed.

2.10 Defendant Nos. 1 and 2 have filed written statement at Exh. 26 in which they have denied the contentions raised by the plaintiff. Defendant No. 3 has also filed written statement at Exh. 27 and also denied the contentions.

2.11 On behalf of the plaintiff, Vinodkumar Kantilal Shah was examined at Exh. 56. As per his say the contract was executed between the plaintiff and defendant Nos. 1 and 2 for supply of 80 to 100 metric ton of goods per day. He has also produced necessary contract and also necessary documents. He has also stated that defendant Nos. 1 and 2 have supplied 381 M.T. of goods and in view of the same as the defendants failed and neglected to supply the goods, the plaintiff was constrained to purchase goods from open market and therefore the plaintiff suffered loss of Rs. 2,83,279.51 in this behalf. It was the case of the plaintiff that defendant No. 3 bank has also given guarantee and therefore to that extent defendant No. 3 is also liable. The plaintiff purchased 710-474 M.T. of goods from the open market. The witness also denied that for additional amount the defendants were not entitled to increase the price because the contract was firm and the defendants have specifically agreed not to increase any rate during the terms of contract.

2.12 The plaintiff also examined Navarlal Budhabhai Parmar at Exh. 72. He was Head-clerk of Central Stores Department at the relevant time. It was the case of the defendants that they were entitled to increased price. However, he has specifically stated that the said terms and conditions were not there and as the mistake committed by the officer in this behalf, it showed that the defendants were entitled to for additional amount.

2.13 The plaintiff also examined Bhupendrabhai Gajjar,

an Assistant Engineer of the Engineering Department, at Exh. 76. He has stated that as the defendant has failed and neglected to supply the goods the plaintiff was constrained to purchase goods from the open market. He has also stated that the plaintiff had to purchase from different parties at higher price than the price at which the plaintiff made contract with the defendants. In view of the same, he stated that the plaintiff had incurred additional expenses at Rs. 2,92,343.79 for the purchase of goods in this behalf. The plaintiff has also produced certain documentary evidence in support of the same.

2.14 When the matter was heard by the learned judge, he has considered the rival contentions of the parties and findings of the learned judge are as follows:

(i) The defendants agreed to supply paving asphalt 80 to 100 metric ton per day by virtue of contract dated 20.11.1973. The defendant also contracted to supply 2000 M.T. of paving asphalt.

(ii) Defendant No. 3 undertook to indemnify the plaintiff against any loss suffered or damage caused to the extent of rs. 45,100/- on account of the breach committed by the defendants. It is further held that defendant No. 3 would continue to be liable till all the dues of the plaintiff are fully paid.

(iii) The learned judge held that defendants have only supplied 381 M.T. of paving asphalt from 9.10.1973 to 31.1.1974 and the defendants have failed to supply 80 M.T. asphalt per day and committed breach of contract. The plaintiff therefore purchased 695.037 M.T. paving asphalt from open market. As the defendants have committed breach of contract, the plaintiff had to incur additional expenses of Rs. 2,83,279.51 and suffered loss to that extent on account of the breach by the defendants and the plaintiff is entitled for the same.

(iv) The learned judge held that the plaintiff has not agreed to the price difference payable to the defendants. He has also held that the suit is not barred by limitation. The learned judge has held that the court has jurisdiction to try and entertain the suit. He held that the bank guarantee was not to subsist only upto 31.3.1974 but till contract is continued.

3. Being aggrieved and dissatisfied with the aforesaid decision of the learned judge, the appellants-original defendants have filed appeal before this court. The learned advocate for the appellant has submitted that the learned judge has not properly appreciated the terms and conditions of the contract and misinterpreted the same in passing illegal decree. It was further submitted that the plaintiff has grossly violated the conditions of contract and therefore the learned judge erred in passing the decree in favour of the plaintiff and against the defendants. The learned counsel for the appellants further submitted that the learned judge ought to have dismissed the suit on the ground that the same is not maintainable and only the Bombay Court has jurisdiction and to Ahmedabad Court. It is alternatively submitted that even if the court comes to the conclusion that the appellant had committed breach of contract, decree of damage of Rs. 2,53,000/- and odd is not warranted by the facts and circumstances of the case.

4. On the other hand Mr. Nagarkar, learned advocate for the respondent Municipality has tried to support the finding of the learned judge. There is no dispute about the fact that the plaintiff and the defendant No.1 have executed contract on 20.11.1973 at Exh. 64. Clause 4 of the said contract provides that the defendant was to supply goods of 80 to 100 M.T. per day at delivery. The price was fixed at Rs. 483.75 per M.T. plus sales tax. The defendant also executed security of Rs. 45,100/- in favour of the Corporation through defendant No. 3 Bank. Thus, the plaintiff has proved that defendant had agreed to supply goods by virtue of the contract dated 20.11.1973. As per clause 2 defendant also agreed to supply 1500 M.T. plus 500 M.T. of the goods to the plaintiff. The plaintiff also proved that by virtue of contract at Exh. 64 and also letter addressed by defendant dated 28.4.1973 at Exh. 103 it was stated that out prices are firm throughout the year even if the price revision circulars issue by their principals, the defendants shall not charge any such increase to the Corporation. In view of the same, the defendants were not entitled to any revision of price.

5. In view of the aforesaid circumstances, defendant Nos. 1 and 2 have accepted the contract on the basis that there was no condition of revision of price and the plaintiff has not agreed to price escalation.

6. In view of the oral and documentary evidence which we have considered, defendant Nos. 1 and 2 have

supplied only 381 M.T. and failed and neglected to supply the remaining part of the goods as per the terms and conditions. As the defendants failed and neglected to supply 80 M.T. to 100 M.T. of goods, the defendants have committed breach of contract.

7. It is no doubt true that during the subsistence of the contract defendant Nos. 1 and 2 addressed letter dated 21.3.1974 at Exh. 107 wherein they have requested the plaintiff that as the prices at which the defendants were supplying the materials were very low and that the plaintiff grants some increase in the price. However, from the evidence which we have discussed, particularly, the contract and further correspondence, in view of the fact that the defendants had agreed for firm price and specifically agreed that they will not claim any increase in price, we are of the view that the defendants are not entitled to any increase in this behalf.

8. As the defendants failed and neglected to supply the goods to the plaintiff, the plaintiff purchased asphalt from other three different parties and has paid excess amount of Rs. 2,83,279.51 than what could have been paid to the defendants. The plaintiff has also produced necessary register at Exh. 99. The plaintiff has proved that the plaintiff has purchased 695.037 M.T. of goods at the rate of Rs. 850/- per M.T. In view of the same, the plaintiff proved that defendants committed breach of contract and the plaintiff is entitled to damages of Rs. 2,83,271.51 ps.

9. The plaintiff also proved that cause of action against the defendant arose on 13.12.1973. When the defendant did not supply 80 M.T. on 31.1.1974 the defendants committed breach of contract by not supplying the goods and the plaintiff suffered loss by breach of contract and on 30.8.1976 a notice of demand was served on the defendants and as the present suit is filed on 28.3.1977 the suit is within the period of limitation.

10. As the contract was executed at Ahmedabad and the goods were to be supplied in Ahmedabad and whatever amount was to be paid at Ahmedabad by the plaintiff either in cash or by cheque, the court at Ahmedabad had jurisdiction to entertain and try the suit.

11. In view of the aforesaid discussion, we are therefore of the considered view that defendant Nos. 1 and 2 shall pay Rs. 2,53,892.41 ps. to the plaintiff with interest at the rate of 6% from the date of the suit till realisation. The decree of the learned judge dated

28.7.1981 in Civil Suit No. 2681 of 19777 is confirmed. The appeal is dismissed with no order as to costs.

12. As the plaintiff purchased goods of 381 M.T. the price of which comes to Rs. 2,36,089.41 ps. and the plaintiff has paid only Rs. 2,06,702.01 ps. In view of the same, there was deficit of Rs. 29,387.40 ps which the plaintiff is liable to pay to the defendant against the value of goods. The learned judge has therefore deducted Rs. 29,387.40 from the decree of damages of Rs. 2,83,279.51 and therefore the plaintiff is entitled to Rs. 2,53,892.41 ps.

(K.R. VYAS, J)

(K.M. MEHTA, J)
(pkn)